

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of
LIBERTY PRODUCTIONS,
A LIMITED PARTNERSHIP
Et. Al.

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MM Docket No. 88-577
File No. BPH-870831MI

For Construction Permit for
New FM Channel 243A
Biltmore Forest, North Carolina

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To: The Commission

REPLY TO
RESPONSE TO SUPPLEMENTAL BRIEF

Liberty Productions, a Limited Partnership ("Liberty") by counsel herewith submits its reply to the Response to Supplemental Brief, filed by Willsyr Communications, Limited Partnership ("Willsyr") on January 7, 2000 in the above referenced proceeding. In support whereof the following is shown:

1. While Willsyr argues that the testimony of Klemmer and Warner supports Liberty's disqualification under the site and misrepresentation issues, it fails to offer any credible evidence to support its contention.

2. Willsyr's claim that Klemmer told Utter only that she "might" be interested in leasing a site and that their discussions did not progress beyond discussing the "possibility" of a lease mischaracterizes the record. The "possibility" referred to in this context was the possibility that a future lease would be entered into, if Klemmer obtained a construction permit. It did not have reference to the availability of the site. Thus, the cases cited by Willsyr (at pp. 4-5) which hold that a "mere possibility that a site will be available" is insufficient are inapplicable, here. The discussion of the possibility of entering into a lease in the future is entirely consistent with the existence of reasonable assurance. No current, written agreement has ever been required.

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List A B C D E

3. The record does not support Willsyr's contention that any discussion of a lease was left until some future date. ¹/ Instead, there was an understanding that a lease would be entered when and if Klemmer obtained a permit on the terms agreed to in 1987. (Tr. 661, 665-66, 680, 682, 810-11, 883-86, 889-93, 897-99). Although an exact location for the tower was not determined at the meeting, it was agreed that the tower would be placed as high on Utter's property and as close to the existing tower as possible. (Tr. 881-83, 900) In marking the site on the map, Warner so located the site to the best of his ability. (Tr. 901-03) As to the amount of space required, Utter understood that a 100 foot, free-standing tower was being proposed and knew the approximate amount of space it would require. (Tr. 812, 955) While it is true that there was no discussion of the exact duration of the lease, Warner testified that it was clear that they were discussing a lease like the one Utter had for the TV tower, a multiyear lease. (Tr. 890-92, 963) Contrary to Willsyr's claim, it was agreed that the rent would be \$ 4000 per year. (Tr. 656, 667, 892, 963)

4. Willsyr emphasizes the fact that Warner, not Utter, determined the geographic coordinates for the site. Yet, it offers no evidence that Utter was skilled in such matters. The record reflects that Warner derived the coordinates from a topographic map, after determining where the tower could go in relation to the existing tower, as Utter wanted them as close together as possible. (Tr. 900-03)

5. While Klemmer may not have asked Utter's permission to use her name in Liberty's application, the record is clear that Utter was told that Klemmer would be specifying the site in the application and that Utter was reasonably familiar with the application process. (Tr. 883, 885-86) Klemmer did not ask Utter to let her know if the property were sold,

1. The record does not support Willsyr's claim that Klemmer had no "actual discussion with Utter as to a lease." Klemmer's statement that "a lease was never even mentioned" had reference to a current lease, as the ALJ's inquiry had to do with any discussion of entering into any current, written agreement. (Tr. 559-660)

because she believed that Warner would be aware of any such changed circumstances and would advise her. (Tr. 682)

6. Willsyr makes much of Warner's statement that the commitment from Utter "came out in parts". (Tr. 961-62) However, the record is clear that Warner was referring to the various terms of the prospective lease: Utter's willingness to lease a site, how much she would charge, that the payments would be annual, what general location would be acceptable and when the lease would be entered into. (Tr. 961-62) While Warner's recollection of events may not have been sufficient to include the exact words spoken in every instance, it was exceptionally detailed and vastly superior to that of Utter. See: Supp. Brief at 7-15; Tr. 823-982.

7. Because Warner believed Utter's property would be the best location for Liberty's tower, it was entirely reasonable that Klemmer would contact Utter, first. Klemmer had no reason to contact other owners, once Utter had agreed to make a site available. Although, as Willsyr suggests, Liberty's proposed site was "one of few" feasible sites, there were other potential sites both on Busbee and Stadley Mountains, including another on Utter's property. (Tr. 834-35, 957) Indeed, when Liberty learned in 1989 of Utter's change of heart, it immediately secured permission to specify the existing TV tower on her property and filed an amendment proposing that site. While Warner believed there were advantages to constructing a new tower on Utter's property (see para. 12, infra.), Liberty could easily have obtained approval in 1987 to locate on the existing tower, had Utter not agreed to lease Klemmer a site. It readily obtained such permission in 1989, as had Skyland Broadcasting Company (File No. BPH-870830ML) and Ernest J. Phillips (File No. BPH-870830MH) in 1987. (Official Notice Requested)

8. While it is true that Brian Lee entered into and recorded a lease with Utter on August 21, 1987, Willsyr has offered no evidence to support its claim that either Warner or Klemmer were aware of this lease in August, 1987. Both repeatedly affirmed that they were not. (Tr. 659, 676-77, 876-77, 915, 937, 940-43) While Klemmer's former husband's law practice may have

included real estate, there is no evidence he was involved in any transactions involving Busbee Mountain or even that he visited the courthouse. If he did, there is no evidence that he was aware of the recording of any particular lease. Likewise, Willsyr's contention that Warner "routinely" researched land records at the courthouse is belied by its own citations to the record. Warner testified that his research was related to the siting of the WCQS tower and, thus, occurred in "February/March, of '87" and that he had never researched such records again. (Tr. 944)

9. Willsyr's suggestion that Liberty selected its site so as to be as far away as feasible from Lee's site is not only unsupported, it is contrary to the record. Utter agreed with Warner's suggestion that the site be located as close to the existing tower as possible. (Tr. 678, 811-12, 881-83, 900) Thus, when Warner plotted the site on the map, he placed it as close to the existing tower as possible and derived the geographic coordinates accordingly. (Tr. 900-03)

10. Willsyr's speculation is entirely undermined by the terms of Lee's lease, which do not include an exact specification of the location of the site. (Orion Ex. 4) In fact, the ALJ took the position that Lee's lease was so nonspecific as to encompass Liberty's site. ID at 47-48. ²/ Thus, even if he had been aware of it in August, 1987, Warner could not have determined from the lease where Orion's tower site would have been located.

2. The ALJ's opinion (ID at 47-48) that Lee's lease precluded Utter from leasing a site to Liberty was flatly disputed by Utter. Utter advised Warner in 1989 that the two sites were in different locations and were not in conflict. (Tr. 927, 930, 948) Furthermore, Utter told Lee that she considered herself free to deal with Klemmer and Lee acknowledged that he had no intention of using the site if Orion did not obtain the permit. (Tr. 2480, 2499-2500) He also confirmed that Utter was aware that, while there might be many applicants, there would be only one permittee. (Tr. 2502) Finally, the lease specifies the purpose for which the land may be used: the construction of a 160 foot tower. Thus, without a permit, Lee would not have been able to make use of the property for the intended purpose. The ALJ's suggestions to the contrary were simply rubbish and further reflect the extent of his bias on the issue. His claim that Liberty's site was north (uphill) of Orion's site was also incorrect. (Tr. 979)

11. Willsyr's claim that Lee's site was "the highest and best" location for a tower is not supported by the record. While Lee may have believed it was the best, Warner did not. (Tr. 881) It certainly was not the highest—it was 50-60 feet further down the side of the mountain. (Liberty Ex. 11; Tr. 980) The site Liberty proposed, near the road, was the highest location available on the property and, thus, the best in Warner's opinion. (Tr. 881-83, 980) ³/

12. Willsyr clearly misunderstands Warner's testimony regarding the existing tower. Warner testified that he discussed with Utter the fact that, in the event Mr. Sorrells was successful in having the existing tower taken down, then the TV antenna could be mounted on Liberty's proposed tower. (Tr. 881-82) Warner agreed with Lee that TV tower appeared to infringe upon the right of way. (Tr. 840, 2455) Thus, although the question was never specifically addressed, it appears that the problem with Sorrells, as well as the height of the TV tower, were the reasons Warner did not recommend its use to Klemmer in 1987. (Tr. 840, 877-78)

13. The cases cited by Willsyr (at pp. 4-5) do not support the disqualification of Liberty. In National Innovative Programming Network, 2 FCC Rod. 5641 (1987) the Commission held that reasonable assurance requires only some evidence of the site owner's favorable disposition to make the site available, beyond a "mere possibility," that rent and other details may be left for negotiation at some future date and that the applicant should have obtained sufficient response to its inquiry to justify its belief that the site is available. Id. at 5643. In National Innovative the Commission found the applicant fully qualified, based solely upon the site owner's indication that it was favorably disposed to enter into an agreement at some future date, despite the fact that none of the terms of the proposed lease had been discussed, much less agreed to. Here, Liberty did far more.

3. It should be noted that the discussions cited by Willsyr (at p. 4) regarding Lee's site were from a conversation between Utter, Klemmer and Warner in 1989, not 1987. (Tr. 930, 948)

14. In Dutchess Communications Corp., 101 FCC2d 243 (RB 1985) the disqualified applicant simply assumed it could lease the site for a hypothetical sum, where the owner had expressed willingness only to sell. Id. at. 253. That case bears no relation to the present facts. Contrary to Willsyr's characterization, Cuban-American, Ltd., 2 FCC Rcd. 3264, (RB 1987) states that reasonable assurance requires either: "the site owner's...express approval of the site specification or at least some basic negotiations between the parties from which reasonable assurance may be inferred." (emphasis added) Liberty more than met the later test.

15. Lee Optical, 2 FCC Rcd. 5480 5486 (RB 1987) does not hold that an applicant may not rely upon a verbal agreement to enter into a lease in the future, contingent upon obtaining a permit. Instead, the applicant disqualified in that case had not had any discussions with the owner regarding a prospective lease, having only been advised that the owner was favorably disposed to entering into such discussions. Here Liberty demonstrated that, at least in August, 1987, Utter was favorably disposed to entering into a lease, not simply engaging in future discussions.

16. Contrary to Willsyr's characterization, the applicant's lack of reasonable assurance in Houston Family Television, Ltd., 101 FCC2d 661 (RB 1985) was not predicated upon any "misunderstanding" with the site owner/agent. On the contrary, the applicant there had no basis for any understanding, as it had not had any communication with the owner/agent of the site until the day an amendment specifying the site was filed. Likewise, it had not contacted the owner/agent of its original site until three months after its application specifying the site had been filed. 101 FCC2d 676, 700-01 (ALJ 1984) Nevertheless, the specification of two different sites without reasonable assurance of either did not warrant disqualification, because there was no evidence of any "willful and calculated effort to deceive the Commission." 101 FCC2d at 665.

17. In William and Anne Wallace, 49 FCC2d 1424, 1427 (RB 1974) the Board held that some indication by the property owner that he is "favorably disposed" to make the site available is necessary and that a "mere possibility" that site will be available is insufficient, citing El Camino Broadcasting Corp., 12 FCC2d 25 (1968). In Wallace the applicant had failed even to inquire as to the availability of the site until after the application was filed. In El Camino the "mere possibility" was characterized by facts which showed that the site owner was unwilling even to discuss any lease of a site until after a permit was issued. Nevertheless, these far more egregious facts did not warranted the addition of any character issue. Id. at 27.

18. Substantial evidence of a deliberate intent to deceive is the sine qua non of misrepresentation. Armando Garcia, 3 FCC Rod. 1065, 1067 (RB 1988); accord Fox River Broadcasting, Inc., 93 FCC2d 127, 129 (1983); Kaye-Smith Enterprises, 71 FCC2d 1402, 1415 (1979). The facts must demonstrate that the applicant engaged in a "willful and calculated effort to deceive". Old Time Religion Hour, Inc., 95 FCC2d 713, 722 (RB 1983); see also: Bluegrass Broadcasting Co., 43 FCC2d 990, 994 (1973) Willstyr does not even attempt to address the evidence in light of this standard. It presented no evidence of intentional deception, because there is none. Instead it argues that the misrepresentation issue should be resolved adversely based upon a series of unsupported and faulty premises.

19. First, Willstyr contends that Klemmer had a motive to falsely certify, because she had "no realistic choice" but to specify Utter's property. As has been demonstrated, this claim is entirely contrary to the facts. See para. 7, supra. Not only were there other sites available, ⁴/ but Klemmer easily could have obtained permission in 1987 to specify the existing tower on Utter's property, as she did in 1989 and as did two competing applicants in 1987.

4. The 13 applications accepted for tender in this proceeding proposed a total of 11 different transmitter sites. See: Public Notice Report No. 14205, released October 15, 1987, at pp. 5-6 (Copy attached).

20. Secondly, Willsyr argues that Klemmer and/or Warner either knew or should have known of the existence of Lee's lease. This premise, entirely unsupported by the record, is based upon Willsyr's theory that either Warner or Klemmer's husband would have been aware of Lee's lease, based upon their supposed access to local land records. As demonstrated above, however, there is no evidence that Klemmer's husband had any such knowledge and Warner's review of land records occurred six months prior to the execution of Lee's lease. See para. 8, supra.

21. Finally, Willsyr contends that, assuming she had knowledge of Lee's lease, Klemmer could not have certified in good faith in the absence of some written agreement with or payment of monetary compensation to Utter. However, this contention ignores the fact that Utter never requested either a written agreement or compensation from Klemmer. (Tr. 666-67, 898-99) Both Utter and Lee acknowledged that the idea to enter into a current lease was Lee's, not Utters. (Liberty Ex. 13, pp. 15-18, 31; Tr. 2461, 2463, 2467, 2470, 2472) Thus, while Lee requested a current lease, Klemmer did not. Thus, in the absence of any current use of the property, the lack of consideration is irrelevant.

22. Willsyr argues that Warner is not a disinterested witness, but fails to demonstrate the existence of any interest on his part, other than a desire to assist a neighbor. He clearly had no financial interest in Liberty's application. (Tr. 951-52, 966, 973) Willsyr's characterization of Warner as an "agent" of Liberty is erroneous and unsupported by any evidence.

23. Contrary to Willsyr's claim, the existence of Lee's lease does not "corroborate" its claim that Utter did not agree to make a site available to Klemmer, if she were the successful applicant. Utter did not consider Lee's lease to preclude her from dealing with other applicants. See Note 2, supra. The fact that Utter expected to be compensated for a current lease of her property in no manner makes it implausible that she did not expect or request compensation to agree to enter into a future lease, contingent upon Klemmer receiving a permit. This especially is true given the fact that

Utter had previously entered into a verbal agreements with WOQS for a current use of her property for which she neither requested nor received compensation. (Tr. 846-7, 898-99)

24. The fact that neither Warner nor Liberty considers Utter to be a "liar" does not make her testimony either reliable or credible. Liberty's attack on the reliability and credibility of Utter's testimony was based on very specific grounds, none of which Willsyr bothers to address.

See: Supplemental Brief, paras. 8-15. ⁵/

25. The the ex parte communications between the ALJ and Utter are not simply "purported", as Willsyr suggests, they are well documented in the record and did not, as Willsyr contends, address "solely procedural matters." (Tr. 650, 1067-68) Neither the FCC, the parties nor the public has any way of knowing the substance of those communications.

26. Based upon citation to a single sentence of his testimony, Willsyr contends that Liberty has mischaracterized Lee's testimony. However, Liberty never claimed that Utter intended to treat Klemmer differently from Lee. The difference was that Lee wanted to enter into a current lease, while Klemmer simply sought an agreement to enter into a site lease in the event she was the successful applicant.

27. Willsyr's contention that it was necessary for the ALJ to pre-judge the issues is erroneous. Proper and well established procedure required that he hold Liberty's amendment in abeyance until the underlying issues had been resolved. South Florida Broadcasting Co., Inc., 99 FCC2d 840, 845, Note 12 (RB 1984) (site availability issue must be added, tried and resolved before any ruling can be made on site relocation amendment).

5. Liberty was "happy" with Utter's deposition solely because it believed that no additional information was likely to be obtained from Utter, beyond that contained in the deposition, due to her lack of recollection.

Respectfully Submitted

LIBERTY PRODUCTIONS, L. P.

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January 21, 2000

10/15/87

REPORT NO. 14025

BROADCAST APPLICATIONS

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NON-COMMERCIAL EDUCATIONAL FM APPLICATIONS PETITION FOR RECONSIDERATION FILED

FL BPED	-860603MH	NEW 88.5MHZ	OUTREACH COMMUNICATIONS CORPORATION NORTH PALM BEACH , FL	CP FOR NEW FM EDUCATIONAL ON FREQUENCY: 88.5MHZ, #202; ERP: 1.0 KW H&V; HAAT: 45.5 METERS H&V; TL: 1140 OLD DIXIE HIGHWAY, LAKE PARK, FLORIDA; SL//RC: T.B.D. 26 47 58 80 04 35 PET FOR RECON FILED BY OUTREACH COMMUNICATIONS CORP 9/23/87.
KY BPED	-860310MC	NEW 90.1MHZ	FM 90.1, INC. MILLERSTOWN , KY	CP FOR NEW EDUC. FM ON: FREQUENCY: 90.1 MHZ.; #211. ERP: 100 KW H&V; HAAT: 117.3 METERS H&V, TL: 1.5 MI. SE OF MILLERSTOWN, MILLERSTOWN, KY; SL/RC: TO BE DETERMINED 37 25 57 86 01 50 MAJOR ENVIRONMENTAL ACTION UNDER SECTION 1.1305 PET. FOR RECON. FILED BY FM 90.1, INC. 9-30-87.

FM BROADCAST STATION ENVIRONMENTAL ACTION NARRATIVE STATEMENT, IF INDICATED, ACCEPTED FOR FILING

NC	870828MC	NEW 96.5MHZ	OWEN-DUMEYER PARTNERSHIP BILTMORE FOREST , NC	CP FOR NEW FM ON: FREQUENCY 96.5 MHZ, #243; ERP 3 KW H&V; HAAT 100 METERS H&V 35 32 18 82 30 54
NC	870831MG	NEW 96.5MHZ	RAKEL COMMUNICATIONS, INC. BILTMORE FOREST , NC	CP FOR NEW FM ON: FREQUENCY 96.5 MHZ, #243; ERP .37 KW H&V; HAAT 270 METERS H&V 35 31 29 82 27 56
NC	870831MH	NEW 96.5MHZ	ERNEST J. PHILLIPS, III BILTMORE FOREST , NC	CP FOR NEW FM ON: FREQUENCY 96.5 MHZ, #243; ERP 0.25 KW H&V; HAAT 331 METERS H&V 35 31 39 82 29 44
NC	870831MI	NEW 96.5MHZ	LIBERTY PRODUCTIONS, A LTD PARTSHIP. BILTMORE FOREST , NC	CP FOR NEW FM ON: FREQUENCY 96.5 MHZ, #243; ERP .260 KW H&V; HAAT 342 METERS H&V 35 31 39 82 29 45
NC	870831MJ	NEW 96.5MHZ	WILLSYR COMMUNICATIONS LTD PARTSHIP. BILTMORE FOREST , NC	CP FOR NEW FM ON: FREQUENCY 96.5 MHZ, #243; ERP 0.28 KW H&V; HAAT 326 METERS H&V 35 31 48 82 29 41
NC	870831MK	NEW 96.5MHZ	J. MCCARTHY MILLER & JUNE J. MILLER BILTMORE FOREST , NC	CP FOR NEW FM ON: FREQUENCY 96.5 MHZ, #243; ERP 0.266 KW H&V; HAAT 339 METERS H&V 35 31 47 82 29 41
NC	870831ML	NEW 96.5MHZ	SKYLAND BROADCASTING COMPANY BILTMORE FOREST , NC	CP FOR NEW FM ON: FREQUENCY 96.5 MHZ, #243; ERP 0.28 KW H&V; HAAT 327 METERS H&V 35 31 39 82 29 44
NC	870831MM	NEW 96.5MHZ	BILTMORE BROADCASTING ASSOCIATES BILTMORE FOREST , NC	CP FOR NEW FM ON: FREQUENCY 96.5 MHZ, #243; ERP 3.000 KW H&V; HAAT 100 METERS H&V 35 31 10 82 35 35
NC	870831MN	NEW 96.5MHZ	UNITED B/CASTING ENTERPRISES INC. BILTMORE FOREST , NC	CP FOR NEW FM ON: FREQUENCY 96.5 MHZ, #243; ERP 0.254 KW H&V HAAT 339 METERS H&V 35 31 39 82 29 49
NC	870831MF	NEW 96.5MHZ	NATIONAL COMMUNICA. INDUSTRIES, INC. BILTMORE FOREST , NC	CP FOR NEW FM ON: FREQUENCY 96.5 MHZ, #243; ERP 0.281 KW H&V; HAAT 328 METERS H&V 35 31 46 82 29 43

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10/15/97

REPORT NO. 14025

BROADCAST APPLICATIONS

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FM BROADCAST STATION ENVIRONMENTAL ACTION NARRATIVE STATEMENT, IF INDICATED, ACCEPTED FOR FILING

NC	870901MB	NEW 96.5MHZ	SHAMROCK COMMUNICATIONS, INC. BILTMORE FOREST, NC	CP FOR NEW FM ON: FREQUENCY 96.5 MHZ, #243; ERP 0.265 KW H&V; HAAT 337 METERS H&V 35 31 39 82 29 49
NC	870901ME	NEW 96.5MHZ	ORION COMMUNICATIONS LIMITED BILTMORE FOREST, NC	CP FOR NEW FM ON: FREQUENCY: 96.5 MHZ., ERP: 0.261 KW H&V HAAT: 340 METERS H&V, 35 31 38 82 29 45
NC	870901MF	NEW 96.5MHZ	HARBINGER BROADCASTING COMPANY BILTMORE FOREST, NC	CP FOR NEW FM ON: FREQUENCY: 96.5 MHZ., ERP: 3 KW H&V, HAAT: 100 METERS H&V, 35 31 26 82 36 49

FM BROADCAST STATION APPLICATIONS ACCEPTED FOR FILING
(MINOR CHANGE APPLICATIONS ARE SIMULTANEOUSLY ACCEPTED FOR TENDER)

AL BMPH	-870319IF	WZBQ-FM 102.3MHZ	S I S SOUND, INC. JASPER, AL	MOD OF CP (BPH-860404IC) TO SPECIFY 0.75 DEGREE ANTENNA BEAM TILT
AL BPH	-870924IB	WKXX 106.9MHZ	SUNGROUP B/CASTING CORP. OF ALABAMA BIRMINGTON, AL	CP TO CHANGE HAAT: 350.68 METERS (H&V)
FL BPH	-870924IA	WPDO 92.7MHZ	WILLIS & SONS, INC. GREEN COVE SPRINGS, FL	CP TO MAKE CHGS. ERP: 1.3 KW (H&V); CHG. HAAT: 151.5 M (H&V)
FL BPH	-870929IA	WIMV 104.9MHZ	MADISON COMMUNICATIONS CORPORATION MADISON, FL	CP TO MAKE CHGS. TL: 3.18 KM E-NE OF HANSON, FL; CHG. HAAT: 100 METERS (H&V); 30 33 29 83 20 06
IN BALH	-871001HE	WRCR 94.3MHZ	RUSH COUNTY B/CASTING CO., INC. RUSHVILLE, IN	VOL AL FROM RUSH COUNTY BROADCASTING COMPANY TO QUANTUM BROADCASTING CORPORATION FORM 314 AUX. ATTY: NONE ASSIGNEE ADDRESS: 32 WINDING WAY, ANDERSON, IN 46011
NY BPH	-870928IB	WKFM 104.7MHZ	WKFM-SYRACUSE, INC. FULTON, NY	CP TO CHANGE HAAT: 150 METERS (H&V)
OK BPH	-870924IE	KRHD-FM 102.3MHZ	DUNCAN BROADCASTING CO., INC. DUNCAN, OK	CP TO CHANGE HAAT: 100 METERS (H&V)
TX BMPH	-870914IC	KFAN 101.1MHZ	GILLESPIE BROADCASTING COMPANY FREDERICKSBURG, TX	MOD OF CP (BPH-870217IH) TO CHANGE TL: 10.4 KM NW OF BOERNE, TEXAS 29 50 26 98 49 32

-O V E R -

CERTIFICATE OF SERVICE

I, Timothy K. Brady, hereby certify that I have this dist day of January, 2000, served a copy of the foregoing Reply to Response to Supplemental Brief by First Class mail, postage prepaid upon the following:

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